

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DAVID LEYRAUD,

Defendant-Appellant.

UNPUBLISHED

October 11, 2011

No. 299161

Oakland County Circuit Court

LC No. 2010-230718-FH

Before: MURPHY, C.J., and TALBOT and MURRAY, JJ.

PER CURIAM.

David Leyraud appeals his jury trial conviction of fourth degree criminal sexual conduct. Leyraud argues that he was denied a fair trial because evidence regarding his past criminal history was improperly admitted at trial. Leyraud was sentenced to three to 15 years in prison with a credit for 26 days. We affirm.

The criminal sexual conduct conviction arises out of an incident occurring between Leyraud and Penny Dickson's 15-year-old daughter (hereinafter "victim"). Dickson began to correspond with Leyraud in approximately 1988. Leyraud first visited the Dickson home in 2007 with Leyraud and Dickson initiating an intimate relationship despite her being married.

On January 8, 2009, the victim stayed home from school. While she expected to be home alone she encountered Leyraud in the house. As the victim was walking through the house after initially encountering Leyraud, he came up behind her and she could feel his breath on her neck. Leyraud followed behind the victim as she continued walking. He then stopped the victim from walking by reaching around her and putting his hands on her breasts. Leyraud's hands remained on the victim's breasts for at most five minutes before she was able to move away from him and return to her bedroom. The victim later asked Leyraud to leave the house. He eventually complied and asked the victim not to tell anyone about what happened that day.

At trial the prosecution indicated during its opening statement that "[t]he connection with the Defendant and the Dicksons is that the Defendant years back was running into some problems. He was down on his luck and Mrs. Dickson decided to become his pen pal." Dickson also testified that she became acquainted with Leyraud through his sister-in-law. Dickson initiated contact with Leyraud in 1988 by sending him letters when he was "down on his luck." The letters continued for twenty or more years and Leyraud began to visit the Dickson home in approximately 2007.

Leyraud argues that he was denied a fair trial because the prosecution improperly insinuated to the jury during its opening statement and through Dickson's testimony that Leyraud previously had a lengthy incarceration and that such insinuation was the basis for his conviction. We disagree.

The issue regarding the use of the phrase "pen pal" in the opening statement was properly preserved for appeal. Because defense counsel timely brought his concerns regarding the implications of the phrase to the court's attention and those concerns are the same as the issue being raised on appeal,¹ we review this issue for an abuse of discretion.² The issue related to the testimony of Dickson was not properly preserved for appeal,³ and is, therefore, reviewed for plain error affecting Leyraud's substantial rights.⁴

In determining whether the information contained in the opening statement was properly permitted at trial it is first necessary to analyze whether the challenged information in fact insinuated that Leyraud had been incarcerated. The prosecution's opening statement did not divulge the type of problems Leyraud had encountered or why he was "down on his luck." The comment by the prosecution was only fleeting and the prosecutor did not further elaborate on or revisit the subject later in his opening statement. There are reasonable explanations outside of incarceration for why Leyraud may have been experiencing problems or was "down on his luck." There are also reasons why Leyraud and Dickson may have chosen to be "pen pal[s]," such as either party's marital status or the distance they lived from each other. Since Leyraud's criminal history was not explicitly discussed in or implied by the prosecution's opening statement, permitting it to be heard at trial was proper.

Additionally, opening statements are not evidence and the jury is not to consider them when rendering their verdict. The court properly instructed the jury that the attorneys' statements and arguments do not constitute evidence. It is well-settled that "juries are presumed to follow their instructions."⁵ As such, there is no reason to assume that the jury failed to follow their instructions in this case.

Before applying the standard of review to the issue of whether Dickson's testimony was properly admitted at trial, it must also be determined whether Dickson's testimony insinuated that Leyraud had been in prison. The information provided during Dickson's testimony did not discuss or even reference Leyraud's criminal history and did not indicate why Leyraud was "down on his luck." It also did not discuss why Leyraud did not visit the Dickson home until 2007. Dickson's testimony simply provided the jury with information regarding how Dickson and Leyraud became acquainted and how long they maintained contact before Leyraud first

¹ *People v Aldrich*, 246 Mich App 101, 113; 631 NW2d 67 (2001) (citations omitted).

² *People v Kahley*, 277 Mich App 182, 184; 744 NW2d 194 (2007).

³ *Aldrich*, 246 Mich App at 113.

⁴ *People v Carines*, 460 Mich 750, 764; 597 NW2d 130 (1999).

⁵ *People v Hana*, 447 Mich 325, 351; 524 NW2d 682 (1994) (citation omitted).

visited the Dickson home. This testimony put the facts of the case in context and did not imply that Leyraud had been incarcerated.

Leyraud argues that the information revealed during the prosecution's opening statement and Dickson's testimony was highly prejudicial⁶ and irrelevant⁷ to the charge of criminal sexual conduct and should not have been permitted at trial. "[A] jury is entitled to hear the 'complete story' of the matter in issue."⁸ As such, information regarding how Leyraud came to be in the Dickson home on the day of the alleged criminal sexual conduct is relevant as it provides background for the jury and puts the facts of the case in context. The information was not prejudicial because it did not insinuate that Leyraud had been incarcerated.

Leyraud also contends that the challenged statement and testimony provided improper evidence of his character, or other crimes, wrongs or acts;⁹ improper opinion and reputation evidence of his character and specific instances of his conduct;¹⁰ and improper impeachment evidence.¹¹ MRE 608 and 609 address methods of attacking the credibility of a witness. Leyraud misconstrues the use of these rules which are inapplicable to this situation. The witness here was Dickson and not Leyraud and her credibility is not pertinent to the issue on appeal. Since neither the opening statement nor Dickson's testimony insinuated that Leyraud had been in prison, an analysis of MRE 404(b) is also unnecessary.

As the opening statement and challenged testimony did not insinuate that Leyraud had been incarcerated, the admission of such information did not constitute error.

Affirmed.

/s/ William B. Murphy
/s/ Michael J. Talbot
/s/ Christopher M. Murray

⁶ MRE 403.

⁷ MRE 401 and 402.

⁸ *Aldrich*, 246 Mich App at 115 (citation omitted).

⁹ MRE 404(b).

¹⁰ MRE 608.

¹¹ MRE 609.